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No. _____

In The

Supreme Court of the United States

October Term, 1992

REX A. SHARP, KERRY McQUEEN, JAMES H. MORAIN and DANIEL H. DIEPENBROCK, as Individuals, NEUBAUER, SHARP, McQUEEN, DREILING & MORAIN, P.A., as a firm, and ALL OTHER LAWYERS AS A CLASS REQUIRED BY THE STATE OF KANSAS TO REPRESENT KANSAS INDIGENT CRIMINAL DEFENDANTS,

Petitioners,

v.

THE STATE OF KANSAS,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Kansas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Can a State, despite a previous court determination that it has engaged in an unconstitutional regulatory taking of private property, avoid the U.S. Fifth Amendment remedial mandate of paying just compensation by invoking the common law doctrine of prospectivity?

a) If so, does *James Beam* apply to require retroactivity if the previous court rulings were not purely prospective?

b) If *James Beam* does not apply, does federal, instead of state, retroactivity law govern the federal constitutional issue of taking without just compensation?

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THE STATE OF KANSAS,

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Petition For A Writ Of Certiorari To The Supreme Court Of The State Of Kansas

PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of the State of Kansas entered in the above-entitled proceeding.

OPINIONS BELOW

The opinion of the District Court of Seward County, Kansas, is unreported, but is set forth in Appendix 1.

The opinion of the Supreme Court of the State of Kansas is reported at 250 Kan. 408, 827 P.2d 12 (1992). See also Appendix 2.

JURISDICTION

Jurisdiction of this Court to review the judgment of the Supreme Court of the State of Kansas, entered February 28, 1992, rehearing denied on April 21, 1992, is invoked under 28 U.S.C. Section 1257.

UNITED STATES CONSTITUTIONAL PROVISIONS INVOLVED

amend. V provides in relevant part:

> No person shall be . . . deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

amend. XIV provides in relevant part:

> Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; or shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

STATEMENT OF THE CASE

This is a class action suit brought by rural Kansas lawyers seeking damages for past violations of their constitutional rights under a court appointment system that was held unconstitutional by the unanimous Kansas Supreme Court in *State ex rel. Stephan v. Smith,* 242 Kan. 336, 747 P.2d 816 (1987) (*"Smith"*).

1. *Smith* – State Court Appointment System Unconstitutional, Prospective Relief Granted.

Kansas country lawyers ("Plaintiffs") have been court appointed to represent indigent criminal defendants for many years. Over the last few years, the burden on court appointed counsel has increased dramatically because of the combined effect of the increase in the number of criminal cases, the complexitiy of the criminal and constitutional law, and the cost of maintaining a law practice. *Smith,* 242 Kan. at 360-61, 368. Kansas court appointments have been made for the last 20 years under the Indigent Defense Services Act, and its more recent rules and regulations promulgated by the State Board of Indigents' Defense Services (collectively, "Act"). *See* Kan. Stat. Ann. Sec. 22-4501, *et seq.* and Kan. Admin. Regs. 105-1-1, *et seq.*

Not all Kansas attorneys were court appointed under the Act. Only about 35% of the Kansas bar were required to represent indigent criminal defendants. The other 65%, located mainly in large cities where public defenders were supplied, were not required to donate any of their time or money to indigent criminal defense. *Smith,* 242 Kan. at 375-76. Thus, the country lawyers and public

defenders carried the burden of representing the indigent criminal defendants.

Under the Act, the State Board of Indigents' Defense Services ("State Board") set standards and guidelines for compensating court appointed attorneys. Without even considering the cost of providing legal services or the cost of a lawyers' overhead, the State Board adopted regulations allowing a maximum fee of $30.00 per hour, with a $250.00 cap in felony cases which did not go to trial, $1,000.00 cap for cases that did go to trial, and $100.00 cap for representation of indigent grand jury witnesses, revocation of probation hearings, and motions to modify sentences. *Id.* at 345-46, 364. But the average office overhead for court appointed lawyers was more than the $30.00 per hour plus out-of-pocket expenses, so the overhead alone was more than the maximum fee allowed, which was often reduced further by the caps. *Id.* at 351. The payment of legal fees to court appointed lawyers was cut even more, approximately another 12% reduction in 1987, when the State legislature reduced the State Board's budget by 3.8% even though under the same budget the public defenders' salaries and paid overhead was not reduced. *Id.* at 376.

Presented with these facts, the Honorable James J. Smith, District Judge for Anderson County, entered an order that court appointed lawyers were entitled to be paid a reasonable fee of at least $68.00 per hour. *Id.* at 337-39. The Kansas Attorney General filed a Petition for Mandamus to require Judge Smith to make appointments of counsel to indigent criminal defendants as directed by the Act. *Id.* at 340. The Kansas Supreme Court in *Smith* unanimously declared the Act unconstitutional.

The *Smith* court held:

1. Although lawyers had an ethical obligation to provide *pro bono* services, the State had the legal duty to provide counsel for indigent criminal defendants, and the "State had an obligation to compensate attorneys appointed." *Id.* at 359-61.

2. The Act "on its face does not violate [substantive] due process . . . , [but] the application or administration- . . . could render it unreasonable and arbitrary." *Id.* at 363.

3. "Attorney's services are property . . . subject to Fifth Amendment protection", and since the Act did not provide just compensation, "the system violates the Fifth Amendment." *Id.* at 370.

4. The Act violated the equal protection clause because (a) it treated lawyers differently from other professionals by requiring them to subsidize indigent criminal defense; and (b) it treated lawyers differently depending on their geographic location because rural lawyers were court appointed and lawyers in large, urban counties were not. *Id.* at 373-77; 381-83.

Therefore, the *Smith* court struck down the Act, but required Judge Smith to continue court appointing and the country lawyers to continue representing indigent criminal defendants for another 6-1/2 months (until July 1, 1988) while the State took legislative or administrative action to comply with the Constitution. *Id.* at 383.

2. *Sharp-Fed* – Federal Court Damage Action Dismissed on Eleventh Amendment Grounds.

With no State action being taken, Plaintiffs filed suit in federal court seeking immediate injunctive relief to protect their constitutional rights in the future and damages for violations of their constitutional rights in the past. *Sharp, et al. v. State et al.* No. 88-1001-K (D. Kan. March 16, 1988) (hereinafter referred to as *"Sharp-Fed"*). On July 1, 1988, the State adopted a new indigent defense services system which made representation voluntary and increased the hourly fee to $50.00 per hour with no caps or budget reductions.[1] To fund this new system, the State Board's annual budget was increased by more than $2,000,000.00. This mooted Plaintiffs' suit for injunctive relief, and the remaining damage suit in federal district court was dismissed on Eleventh Amendment grounds.

3. *Sharp I* – State Damage Action – Inverse Condemnation and Unjust Enrichment Not Decided on Merits, All Other Causes of Action Dismissed.

On March 16, 1988, Plaintiffs' filed a Class Action Petition in state district court raising numerous federal and state substantive causes of action, including Just Compensation/Taking Violations.

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[1] But the "promise of a voluntary system in practice is questionable as shown by the reinstitution of arbitrary caps, albeit slightly higher than before, (Vol. 1, P. 51-52), and the threat of budget restrictions again. (Vol. 1, P. 53).

The State of Kansas moved to dismiss, claiming that under the Takings/Just Compensation Clause Plaintiffs were only entitled to injunctive relief, not damages, because *Smith* had already provided all the relief that was available. Plaintiffs, however, argued that *Smith* was not a damage suit so the issue was never raised and that the State was subject to inverse condemnation actions and had to pay from the date of the taking.

Without mentioning any of the specific causes of action asserted, the state trial court granted the State's Motion to Dismiss. Plaintiffs appealed to the state court of appeals, and, due to the importance of the issues presented, the case was transferred to the Kansas Supreme Court.

The Kansas Supreme Court affirmed the dismissal, specifically finding that the theory of inverse condemnation was not presented to the trial court and that inverse condemnation actions did not apply to the taking of services, only to the taking of real property (an issue never presented or argued by either party). *Sharp v. State*, 245 Kan. 749, 783 P.2d 343 (1989) (*"Sharp I"*).

Plaintiffs moved for a rehearing or modification of the decision, arguing that the decision was important for the constitutional rights of all service providers and was contrary to the language and intent of *First Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987), which required compensation for governmental taking of property. The motion for rehearing was denied.

4. *Sharp II* – The Instant Case.

The same named Plaintiffs in *Sharp I*, plus a new party, Daniel H. Diepenbrock, alleged a class action again with inverse condemnation for taking Plaintiffs' property or liberty in violation of the Fifth Amendment to the United States Constitution as one cause of action. (Vol. 1, P. 2-26). The State of Kansas again moved to dismiss Plaintiffs' Petition. (Vol. 1, P. 30-40). At the Motion to Dismiss hearing, the State argued that *res judicata* barred all of the causes of action asserted, and, if not, that Plaintiffs failed to state a cause of action for inverse condemnation because such only applied to real, not personal, property. (Vol. 2, P. 1-19). The State also argued that "in essence, requiring the legislature to create a voluntary system with double the budget, that was your relief." (Vol. 2, P. 5).

Plaintiffs argued that *Sharp I* was not *res judicata* because the inverse condemnation action was supposedly not before the court so it was never considered on the merits; the parties were not identical; and the damage relief sought in *Sharp I* was not identical to the instant case. (Vol. 2, P. 1-19). Plaintiffs also argued that they had stated a cause of action for inverse condemnation because the *Smith* court already held that the State unconstitutionally took Plaintiffs' Fifth Amendment protected "property", and, as such, the United States Constitution required the State to pay just compensation. *Id.* Plaintiffs further argued that the State had been unjustly enriched, as evidenced by the change from the involuntary to the voluntary court appointment system requiring $2,000,000.00 budget increase. (Vol. 2, P. 8). Nevertheless, the district court granted Defendant's Motion to Dismiss.

Plaintiffs timely appealed, which again due to the importance of the issues, was transferred to the Kansas Supreme Court. (Vol. 1, P. 89-90).

As in *Sharp I*, the Kansas Supreme Court again relied on a legal doctrine never even mentioned, presented, or argued below in affirming the dismissal. This time the Kansas Supreme Court held that its decision in *Smith* applied only prospectively, so that a retroactive remedy such as just compensation was barred. *Sharp v. State*, 250 Kan. 408, 827 P.2d 12, *reh. denied* (1992) (*"Sharp II"*). With the unraised retroactivity issue suddenly being controlling, Plaintiffs moved for a re-hearing and submitted a 23 page brief on the following federal grounds:

> 1. The Fifth Amendment Just Compensation Clause requires retroactive relief for governmental takings from the date of the taking under *First Lutheran Church*;
>
> 2. Since *Smith* and *Sharp I* were not applied purely prospectively, all subsequent cases based on *Smith* and *Sharp I* must be applied retroactively under *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ___, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991); and
>
> 3. Even if *James Beam* did not apply, the federal retroactivity *Chevron Oil* factors should have been applied when considering a federal constitutional claim which would have required retroactivity.

The State of Kansas filed a 12 page Response Brief, and Plaintiffs filed a 4 page Brief in Reply. However, the Kansas Supreme Court denied Plaintiffs' Motion for Rehearing on April 21, 1992. See Appendix 3. Accordingly, Plaintiffs' timely petition this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. THE KANSAS SUPREME COURT'S ERRONEOUS DECISION ALLOWS THE STATE TO TAKE PRIVATE PROPERTY FOR PUBLIC USE WITHOUT PAYING JUST COMPENSATION WHICH IS CONTRARY TO THE EXPRESS LANGUAGE OF THE JUST COMPENSATION CLAUSE, CONTRADICTS THIS COURT'S HOLDING AND RATIONALE IN *FIRST LUTHERAN CHURCH*, AND UNDERMINES THE FUNDAMENTAL FIFTH AMENDMENT PROTECTION.

The Fifth Amendment[2] to the United States Constitution provides in relevant part:

> [N]or shall private property be taken for public use, without just compensation.

Smith unanimously established that Plaintiff's "private property"[3] was "taken"[4] by the State of Kansas for

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[2] The Fifth Amendment applies to the States through the Fourteenth Amendment. *See Chicago, B & Q.R. Co. v. Chicago*, 166 U.S. 226 (1987).

[3] The *Smith* court held that Plaintiffs' money and services were "private property": "[T]he attorneys are deprived of property in the form of money. We conclude that attorneys' services are property, and are thus subject to Fifth Amendment protection." 242 Kan. 370.

[4] In determining that the court appointed regulations went too far constituting a taking the *Smith* court found: "Attorneys make their living through their services. Their services are the means of their livelihood. We do not expect architects to design public buildings, engineers to design highways, dikes, and bridges, or physicians to treat the indigent without compensation. When attorneys' services are conscripted for the public

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"public use".[5] Nonetheless, the State of Kansas (and the Kansas Supreme Court below) claims it can do so without paying just compensation.[6] One could hardly imagine a claim more patently wrong. Nor could one imagine a claim, if allowed to stand, that could more severely undermine the fundamental individual freedoms embodied in the Fifth Amendment. The court below must be overruled.[7]

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good, such a taking is akin to the taking of food or clothing from a merchant or the taking of services from any other professional for the public good . . . We conclude that attorneys' services are property, and are thus subject to the Fifth Amendment protection. . . . [T]he [old court appointment] system violated the Fifth Amendment." 242 Kan. at 370.

[5] "The obligation to provide counsel for indigent defendants is that of the State, not of the individual attorney." *Smith*, 242 Kan. at 359-60. "Kansas attorneys have an ethical obligation to provide *pro bono* services for indigents, but the legal obligation rests on the State, not upon the bar as a whole or upon a select few members of the profession. *Id.* at 383. Of course, lawyers always have voluntarily fulfilled their ethical obligation, perhaps more than any other profession or business.

[6] Although the Kansas Supreme Court in *Smith* did not reach the issue of what hourly fee would be just compensation, like the trial court's finding of at least $68.00 per hour, it did find that the State of Kansas under the old court appointment system was paying less than the average office overhead of most attorneys, thereby taking their money and paying essentially nothing to the attorneys for services rendered. *Smith*, 242 Kan. at 351.

[7] It should also be noted that under Kansas law, for purposes of a Motion to Dismiss as filed by the Defendant in the instant case, Plaintiffs' pleadings of inverse condemnation must be taken as true. *Keith v. Schiefen-Stockman Inc. Agency, Inc.*, 209 Kan. 537, 538, 498 P.2d 265 (1972).

A. A Common Law Doctrine, Such As Prospectivity/Retroactivity, Cannot Overcome A Constitutional Doctrine.

Without supporting authority, the Kansas Supreme Court in *Sharp II* held that a regulatory taking without just compensation was valid because *Smith* created "new law" and should only be applied prospectively.[8] But the legal authority is just the opposite. The Just Compensation Clause provides a specific constitutional remedy that cannot be taken away by a common law doctrine. The Constitution is the supreme law of the land; it cannot be trumped by any common law doctrine, federal or state. *See, e.g., Golden State Transit v. Los Angeles,* 493 U.S. 103, 107 (1989). *See also infra* at 26 (perhaps it is unconstitutional to apply the prospectivity doctrine to any constitutional rights, not only to specific remedy rights like just compensation).

B. The Opinion Below Conflicts With The Holding Of First Lutheran Church.

Sharp II is the same argument that this Court rejected in *First Lutheran Church v. Los Angeles County,* 482 U.S. 304 (1987). In that case, based on the theory that if a regulation is withdrawn or amended it is only a "temporary" taking, the California State court was overruled holding:

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[8] If the first time a regulation is court tested the law is considered "changed" because the regulation is invalidated, then the alleged "law changing decision" would never be applied retroactively. The state legislature, like dogs, would get "one free bite" at a person's constitutional rights *each* time a regulation is promulgated.

> [A] landowner who claims his property has been "taken" by a land-use regulation may not recover damages for the time before it is finally determined that the regulation constitutes a "taking" of his property. We disagree, and conclude in these circumstances the Fifth and Fourteenth Amendments to the United States Constitution would require compensation for that period.

Id. at 306-07. Now, the State of Kansas attempts to reach the same result with a different theory. This time the theory is the common law doctrine of prospectivity. This theory is no better, and perhaps worse since it is not an attempt to interpret away the application of a constitutional doctrine but an attempt to overcome it with a common law doctrine.

After finding that the Fifth Amendment Just Compensation Clause was a "self-executing" constitutional provision permitting an inverse condemnation action, the Court held:

> Government action that works a taking of property rights necessarily implicates the constitutional obligation to pay just compensation. . . . The Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution. . . . Invalidation of the ordinance . . . though converting the taking into a "temporary" one, is not a sufficient remedy to meet the demands of the Just Compensation Clause. . . . The owner has a right to bring an "inverse condemnation" suit to recover the value of the land *on the date of the intrusion by the Government* . . . [N]o subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective.

Id. at 315, 316, 319, 320 n.10, 321 (emphasis in original). *First Lutheran Church* also quotes and cites Justice Brennan's dissent in *San Diego Gas and Electric Co. v. San Diego,* 450 U.S. 621, 637 (1981), where he succinctly stated the constitutional law with respect to regulatory takings as follows:

> The government entity must pay just compensation for the period commencing on the date the regulation first effected the "taking" and ending on the date the government entity chooses to rescind or otherwise amend the regulation.

Id. at 658 (J. Brennan, dissenting, joined by J.J. Stewart, Marshall, and Powell). The Kansas Supreme Court's opinion below, however, disregards the constitutional duty to pay from the date of the taking. That alone, on such a fundamental constitutional right, is enough to grant a writ of certiorari. *See Limbach v. Hooven & Allison Co.,* 466 U.S. 353, 362 (1984) ("We are concerned with federal issues and a contention that a state court disregarded a federal constitutional ruling of this Court.")

Not only is the opinion below contrary to the express language of the Fifth Amendment and the clear holding of *First Lutheran Church,* but it also ignores the intent of the Fifth Amendment Just Compensation Clause.

C. The Opinion Below Disregards The Intent Of The Fifth Amendment And Thereby Permits States To Exploit Political Minorities.

The Fifth Amendment's guaranty that private property shall not be taken for public use without just compensation was designed to bar government from forcing some people to bear

> public burdens, which, in all fairness and justice, should be borne by the public as a whole.

Armstrong v. United States, 364 U.S. 40, 49 (1960) (quoted in *First Lutheran Church*, 482 U.S. at 318-19). *See also* L.Tribe, *American Constitutional Law*, Sec. 9-4 (1978) (just compensation limits government's power to isolate particular individuals for sacrifice to the public good). This is exactly the type of discriminatory burden which the *Smith* court found abhorrent in the old court appointment system: "Assisting the indigent is a legitimate public goal, but cannot be accomplished at the expense of a particular group of people." *Smith*, 242 Kan. at 373. *Accord Pennell v. San Jose*, 405 U.S. 1, 21-24 (1988) (Scalia, J., concurring and dissenting in part, joined by J. O'Connor). Now that just compensation must actually be made, however, the Kansas Supreme Court wants to ignore the discriminatory isolation of a small group of people it previously found in *Smith*.

The old court appointment system unfairly singled out a politically unpopular group based on its profession (lawyers) and on its geographic location (rural). Next time the exploited individuals may be based on another profession, another geographic region, race, religion, sex, or age. The possible regulatory abuses of power are as endless as they are disconcerting. The Constitution has long been a savior for the rights of individuals from the whims of the political majority. The Fifth Amendment Just Compensation Clause is one such protection. The opinion below subverts that protection, and, by doing so, paves the way for future regulatory discrimination. *See* Fallon and Meltzer, *New Law, Non-Retroactivity, and Constitutional Remedies*, 104 Harv.L.Rev. 1733, 1831 (1991)

("strong political incentives push states to impose and maintain discriminatory taxes"). Such discrimination cannot be sanctioned, even for a short period of time. *See San Diego Gas*, 450 U.S. at 656 (mere invalidation would fall far short of fulfilling the fundamental purpose of the Just Compensation Clause) (J. Brennan, dissenting, joined by J.J. Stewart, Marshall, and Powell). To uphold the plain language and intent of the Just Compensation Clause, just compensation must be paid to Plaintiffs who were unfairly singled out to shoulder a public burden.

D. The Decision Below Could Undermine All Constitutional Rights.

The decision below conflicts with and even negates the fundamental reason for the Just Compensation Clause. Worse yet, if the common law doctrine of retroactivity is supreme over express remedies provided in the Fifth Amendment, it most likely would be superior to: (1) other express constitutional rights, such as free speech, equal protection, and due process; (2) implied constitutional remedies as previously recognized in *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 402 U.S. 388 (1977) and its progeny; and (3) of course, other federal and state statutes, regulations, and common law rights generally thought to be subordinate to the Constitution. Worse still, the decision below may open the door for other common law doctrines to trump constitutional doctrines.[9] The generally accepted superiority of

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[9] The Solicitor General argued in *First Lutheran Church* that the common law doctrine of sovereign immunity prevented

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laws (federal constitution, then federal statutes, common law, state constitution, state statutes and state common law) would be turned topsy-turvy or at least cast into a state of confusion. Constitutional rights would no longer be as secure, and the confidence generally placed in the judiciary for objectively administering a rule of law would be undermined as cases, even constitutional ones, are decided on an *ad hoc* basis.

E. The Decision Below Is Critically Important To All States, Counties, Cities, And Regulatory Bodies And The Citizens Over Which They Govern – That Means Everyone.

If the Just Compensation Clause can be read out of existence through the retroactivity doctrine, the effect will be to overrule or severely undercut *First Lutheran Church*. The importance of this case can be gauged by looking at *First Lutheran Church*. The importance of that case can be measured by the sheer number of *amicus curiae* briefs filed and the prominence of the entities which filed them. In *First Lutheran Church*, thirty-four (34) *amicus* briefs were filed. *See* 96 L.Ed.2d at 731-33. Those writing *amicus* briefs in favor of allowing regulatory takings without paying just compensation (contrary to this Court's holding in *First Lutheran Church*) were the following: Solicitor General for the United States; Attorney Generals for 23 states, Alaska, Arkansas, California, Florida,

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operation of the Just Compensation Clause against the Government, but that common law reason for ignoring the express language of the Fifth Amendment was rejected. *First Lutheran Church*, 482 U.S. at 316 n. 9.

Hawaii, Illinois, Maine, Massachusetts, Minnesota, Mississippi, Missouri, New Hampshire, New York, North Dakota, Oklahoma, South Carolina, South Dakota, Texas, Utah, Vermont, Virginia, Washington, and Wyoming; Attorney General for the Commonwealth of Puerto Rico; City of Los Angeles (joined by 15 other cities); National Association of Counties (joined by the National League of Cities. U.S. Conference of Mayors, National Conference of State Legislatures, National Governors' Association, and others); and Conservation Foundation. *Id.*[10] Six other *amicus* briefs urged the Court to require just compensation: American College of Real Estate Lawyers; California Association of Realtors; California Building Industry Association; National Association of Home Builders; National Association of Realtors; and Pacific Legal Foundation. *Id.* at 731.

Moreover, as this case illustrates, the definition of "property" under the Fifth Amendment is not limited simply to real estate, so the implications for this case are even greater than that considered in *First*

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[10] This Court recognized the substantial interest states, counties, and cities had in *First Lutheran Church*, but held that those concerns were overcome by the more fundamental concerns addressed in the Fifth Amendment. "We realize that even our present holding will undoubtedly lessen to some extent the freedom and flexibility of land-use planners and governing bodies of municipal corporations when enacting land-use regulations. But such consequences necessarily flow from any decision upholding a claim of constitutional right; many of the provisions of the Constitution are designed to limit the flexibility and freedom of governmental authorities, and the Just Compensation Clause of the Fifth Amendment is one of them." 482 U.S. at 321.

Lutheran Church. The importance of this case would be even more far reaching than *First Lutheran Church* since the retroactivity doctrine here could be used to ignore other constitutional rights, whereas, the "temporary taking" theory in *First Lutheran Church* was specifically limited to the Just Compensation Clause. Thus, the national stakes are higher in this case than in the seminal case of *First Lutheran Church.* Certiorari should be granted, and the decision below reversed.

F. Attempts By The States To Avoid Paying Just Compensation Are A Recurring Problem With Overwhelming Economic Implications.

Before *First Lutheran Church,* this Court's own docket[11] showed the recurring nature of the just compensation issue. "Four times this decade, we have considered similar claims and have found ourselves for one reason or another unable to consider the merits of the *Agins* rule." *First Lutheran Church,* 482 U.S. at 310 (citing *Agins v. Tiburon,* 447 U.S. 255 (1980); *San Diego Gas; MacDonald, Sommer & Frates v. Yolo County,* 477 U.S. 340 (1986); and *Williamson County Regional Planning Commission v. Hamilton Bank,* 473 U.S. 172 (1985)). Although *First Lutheran Church* should have brought an end to the issue, the instant case demonstrates that States continue to seek ways to avoid the clear language of the Just

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[11] Cases which did not reach this Court also denied effect to the Just Compensation Clause. *See, e.g., Davis v. Pima County,* 121 Ariz. 343, 590 P.2d 459 (1978) (later overruled by *Corrigan v. City of Scottsdale,* 149 Ariz. 538, 720 P.2d 513 (1986)).

Compensation Clause and *First Lutheran Church.*[12] Allowing the decision below to remain the law will no doubt touch off an exception to *First Lutheran Church* that will swallow the rule, and the Just Compensation Clause in the process. States, for obvious financial reasons as well as ease in planning regulations, would flock to the exception.

The economic impact of ignoring the just compensation clause would be overwhelming. For instance, this case involves a claim in excess of $2 million per year, for many years. Although relative to a State's annual budget that is not significant, it is to those whose property has been illegally taken. The recurring nature and magnitude of this problem is illustrated by another Kansas case which this Court recently reversed on constitutional grounds. *Barker v. Kansas,* 503 U.S. ___, 112 S.Ct. ___, 118 L.Ed. 2d 243 (April 22, 1992).

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[12] The recurring nature of the just compensation issue is further demonstrated by the desperate attempt of the Kansas Supreme Court to avoid the Just Compensation Clause in *Sharp I. In dictum,* without any reasoning or legal support, and with neither party raising the issue, the *Sharp I* court found that the Just Compensation Clause only protected real, not personal, property. This real versus personal property distinction was squarely before the court in *Sharp II,* but the Kansas Supreme Court chose to avoid its own issue. Instead, the Kansas Supreme Court again seized on an issue never before raised by either party, prospectivity, to accomplish the same result of denying Plaintiffs' just compensation. As shown herein, the prospectivity ruling is equally without legal support, reasoning, or justification. Worse yet, the real versus personal property distinction with respect to the Just Compensation Clause remains as *dictum* in *Sharp I.*

In *Barker*, the Kansas Legislature decided to tax military retiree benefits received from the United States Government but not retiree benefits received from state and local governments. The Kansas Supreme Court upheld the discrimination as rationally based, having the effect of protecting the state fisc. The United States Supreme Court reversed and remanded. *Id.* After the decision, an attorney for the State of Kansas stated publicly that the State of Kansas would seek in Kansas courts to avoid retroactivity which would cost an estimated 60-100 million dollars. *Wichita Eagle* (April 22, 1992) at 1, 6. The State of Kansas in the decision below as well as in *Barker* has already focused on the retroactivity doctrine as an opportunity to avoid its constitutional obligations. It is vital to Kansans, as well as to all other citizens, to nip in the bud this disregard for constitutional rights.

G. The Decision Below Actually Encourages, Rather Than Discourages, Abuse Of Constitutional Rights.

Hans v. Louisiana, 134 U.S. 1 (1890), relegates Plaintiffs to state court jurisdiction when they seek damages against the State. *See also, Sharp-Fed.* Thus, Plaintiffs are stuck in a potentially biased and politically pressured court. The State is judged by its own employee – a State judge, who is not permanently appointed or elected, and therefore must engage in some "politics".[13] The State

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[13] History shows that State courts often are inhospitable to suits against state governments and state officers for violating the federal Constitution." Chemerinsky, *State Sovereignty and*

(Continued on following page)

controls the purse strings of the state judiciary which *Sharp II* admitted left the Kansas judiciary "already underfunded and understaffed". 250 Kan. at 416. The conflict of interest, or at least the appearance of impropriety, is obvious.

With state court as the playing field, individuals may only take solace in clear, unmistakable rules, without *ad hoc* exceptions, such as the Constitution. However, the opinion below permits the Constitution to be applied on an *ad hoc* basis, not uniformly to everyone. So, the constitutional rights can be different for some people than they are for others. Perhaps worse than allowing the constitutional rules to shift and change depending on the case, is the possibility that this Court will become more remote in overseeing constitutional rights adjudicated in state courts. Because retroactivity determinations are largely made based on a factual analyses or a judgment call, this Court may give up much of its power to review state court decisions, which by some estimations (though understandably) is already too small to have any real deterrent effect on state courts or any remedial effect on the numerous errors committed therein.

Moreover, even before a regulation reaches a state court for determination of its constitutionality and ultimately its retroactivity such that just compensation could be allowed, the State Legislature will realize that it can regulate however it wants with no risk and great potential benefits. If the regulation is invalid, retroactivity may

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(Continued from previous page)

Federal Court Power: The Eleventh Amendment after Pennhurst v. Halderman, 12 Hastings Const. L.Q. 643, 664 (1985) (citing Neuborne, *The Myth of Parity*, 90 Harv.L.Rev. 1105 (1977)).

be denied so that the State gets to keep the benefit of its ill-gotten gains. At the very least, the State will have to disgorge what it illegally took by paying just compensation, so it essentially breaks even. In other words, over-regulation is a no risk situation. *See San Diego Gas*, 450 U.S. at 655 n. 22. Perhaps the Just Compensation Clause was never intended to deter excessive regulations, but it was never intended to promote them. To allow an exception that leaves the victims empty-handed is to condone unconstitutional behavior. Accordingly, the subversive opinion below should be reversed.

H. The Decision Below Is Unjust.

Smith held that the State of Kansas had unconstitutionally taken private property from Plaintiffs. Now, *Sharp II* holds that despite the unconstitutional conduct which took approximately $2 million dollars per year from a class of rural Kansas lawyers, the State gets to keep what it unconstitutionally took. The State should not be unjustly enriched by virtue of its illegal activity. Nor should Plaintiffs be unjustly diminished while having their constitutional rights violated. Plaintiffs do not ask for a windfall, they only ask that the State disgorge what it illegally took. Since Biblical times, it has been fundamentally wrong, if not a crime, for a person, company or entity to take from anyone else something which is not thejrs. In this particular context, it would be even more unjust, and, indeed, ironic:

> How ironic it would be if in our effort to provide justice to the indigent litigant, we deny it to his attorney.

Gilbert and Gorenfeld, *The Constitution Should Protect Everyone – Even Lawyers,* 12 Pepperdine L.Rev. 75, 86 (1984). The unjust and unconstitutional decision below should be reversed and remanded for a determination of what "just compensation" is.

II. EVEN IF THE PROSPECTIVITY DOCTRINE COULD NEGATE THE JUST COMPENSATION CLAUSE, THE WRONG RETROACTIVITY LAW WAS APPLIED BELOW WHICH RESULTED IN A DENIAL OF PLAINTIFFS' FEDERALLY PROTECTED CONSTITUTIONAL RIGHTS.

The Court below wrongfully applied state retroactivity law instead of federal law. "When questions of state law are at issue, state courts generally have the authority to determine the retroactivity of their own decisions." *American Trucking Assn. v. Smith,* 495 U.S. ___, 110 S.Ct. 2323, 110 L.Ed.2d 148, 159 (1990). But, as here, where federal rights are involved, the retroactivity decision "is a matter of federal law". *Id.* The reason that federal retroactivity law must be applied, which is particularly applicable in this case, is:

> In order to insure the uniform applications of decisions construing constitutional requirements and to prevent States from denying or curtailing federally protected rights, we have consistently required that state courts adhere to our retroactivity decision.

Id. Therefore, the case should be reversed because the court below applied state, rather than federal, retroactivity law.

Federal retroactivity law has recently undergone significant clarification. *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ___, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991) indicates that there are only two possibilities available: Fully retroactive or purely prospective. "Purely prospective" means applying a new decision "neither to the parties in the law-making decision nor to others against or by whom it might be applied to conduct or events occuring before the decision." *Id.* at 488. "Fully retroactive" means that the new decision applies "both to the parties before the Court and to all others by and against whom claims may be pressed, consistent with *res judicata* and procedural barriers such as statute of limitations." *Id.* Fully retroactive "is overwhelmingly the norm . . . and is in keeping with the traditional functions of the courts to decide cases before them based upon their best current understanding of the law. . . . It also reflects the declaratory theory of law, . . . according to which the courts are understood only to find the law, not to make it." *Id.* (citations omitted). Purely prospective application is "infrequently" used. *Id.* (citations omitted).

James Beam went further and held that if a case is not initially applied purely prospectively, it must be applied fully retroactively. Therefore, under *James Beam*, the case below should have been applied retroactively to allow just compensation. First, the Kansas Supreme Court did not reserve the question of retroactivity in *Smith*, and therefore, should be properly understood to have followed the normal rule of retractive application. *James Beam*, 115 L.Ed.2d at 490. Second, *Smith* was not applied purely prospectively, it bound the parties before it, and even ordered rural Kansas attorneys not before the Court

to abide by its decision. 242 Kan. 383-84. Third, the Kansas Supreme Court has already applied *Smith* retroactively or there would have been no need to consider any causes of action in *Sharp I*. Accordingly, *Smith* should be applied retroactively under *James Beam*.

There is also substantial question whether it is even constitutional to apply constitutional law purely prospectively. Three Supreme Court Justices believe prospective application of constitutional rules, such as involved here, is unconstitutional. *James Beam*, 115 L.Ed.2d at 495-96 (Blackmun, J. concurring, joined by J.J. Marshall and Scalia) and at 496-97 (Scalia, J. concurring, joined by J.J. Marshall and Blackmun). It appears Justice Souter may also lean in favor of barring prospective application as Justice White noted in *James Beam*. *Id.* at 495. (White, J. concurring). Thus, prospective application of all decisions, including the one below, may be unconstitutional.

Even if the *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), factors are considered, retroactivity is still required.[14] First, a new principle of law was not established. The Constitution remained the same. It was merely applied to an illegal Act. Besides, the fact that the Act was illegal must have been clearly foreshadowed or the Kansas Supreme Court would not have *unanimously* held in *Smith* that it was unconstitutional, while acknowledging that under old English common law it was questionable whether lawyers could be court appointed for nothing, quoting a case over a century old holding that attorneys must be properly compensated, relying on commentators who in 1980 persuasively argued that lawyers

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[14] Whether *Chevron Oil* is still good law is questionable. "[O]ur decision here does limit the possible applications of the *Chevron Oil* analysis, however, irrelevant *Chevron Oil* may otherwise be to this case." *James Beam*, 111 S.Ct. at 2447.

must be compensated, and recognizing that a majority of 35 American jurisdictions, especially those to recently consider the issue, have held that court appointing lawyers without just compensation is illegal. *Smith,* 242 Kan. at 358-59 (quoting *Webb v. Baird,* 6 Ind. 13, 17 (1954), and citing Shapiro, *The Enigma of the Lawyers' Duty to Serve,* 55 N.Y.U.L. Rev. 737 (1980)). The State of Kansas should not have, and did not, actually rely on the notion that lawyers could be court appointed for free. If the State of Kansas had actually relied, it would not have enacted a statute which provided some compensation for rural attorneys and a public defender system in big cities.[15]

Second, the purpose of *Smith* was to apply the Fifth Amendment protections to attorneys who were being illegally court appointed. Only retroactive relief effectuates the purpose of the Fifth Amendment which is to provide just compensation.

Third, equities of the situation weigh heavily in favor of those who were victimized. It can hardly be argued that the State faces a hardship having to disgorge what it unconstitutionally took relative to those who have had their constitutional rights and property taken. Indeed, it can be argued that this factor always weighs in favor of retroactivity if the burden resulting from retroactivity falls on a government entity, which has the taxing power

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[15] This Court in *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco,* 496 U.S. ___, 110 S.Ct. 2238, 110 L.Ed.2d 17 (1990) also rejected the State's argument (adopted below in *Sharp II,* 250 Kan. at 415) that reimbursement is not required because the State relied in good faith on a presumptively valid statute. 110 L.Ed. 2d 29, 41-45.

to spread the burden. *See American Trucking,* 110 L.Ed.2d at 163. Because this is a class action, there will be virtually no added burden of administration of justice on the courts by allowing retroactive relief. There will be few, if any, other cases arising out of this issue and no other cases will have to be reversed or retired as a result of retroactive application. Thus, even under the *Chevron Oil* factors, retroactivity should apply and the constitutionally guaranteed remedy of just compensation should be provided to Plaintiffs.

CONCLUSION

The State of Kansas did not pay compensation when it took Plaintiffs' private property for a public use in the instant case. The question is does it have to? The answer is emphatically, "Yes". The Just Compensation Clause means exactly what it says – just compensation must be paid. The remedy of just compensation for a taking is absolute. There is no distinction based on who owns the property (doctors, grocers, teachers, laborers, and even lawyers are protected). There is no distinction based on the type of public purpose, on the type of property (tangible or intangible, personal or real, so long as it is "property"), on whether the taking is a physical taking or regulatory taking (though only regulations which go "too far" are takings), on who determines the taking occurred (legislative body formally by eminent domain or courts in an inverse condemnation suit, which is particularly prevalent in regulatory taking cases), on when the determination is made (before the taking by the legislative body or after the taking by the courts), on whether subsequent

government action is taken or not to invalidate, withdraw, or amend the offending regulation, or on who forces the subsequent action (legislature or courts). Nor is some compensation enough. "Of all the terms used in the Takings Clause, 'just compensation' has the strictest meaning. The Fifth Amendment does not allow simply an approximate compensation but requires 'a full and perfect equivalent for the property taken.' " *Penn Central Transp. Co. v. New York City,* 438 U.S. 104, 150 (1978). (quotation omitted) (Rehnquist, J., dissenting, joined by C.J. Burger and J. Stevens).

> As Justice Holmes aptly noted more than 50 years ago, "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

First Lutheran Church, 482 U.S. 321-22 (quotation omitted). The constitutional way in this case is to pay "just compensation" to Plaintiffs for the taking. Certiorari should be granted to do exactly that.

Respectfully submitted,

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APPENDIX 1

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IN THE TWENTY-SIXTH JUDICIAL DISTRICT
DISTRICT COURT OF SEWARD COUNTY, KANSAS

REX A. SHARP, et al., Plaintiff, v. THE STATE OF KANSAS, Defendant.	)	Case No.: 90 C 14

JOURNAL ENTRY OF JUDGMENT

NOW on this 14th day of September, 1990, the above-captioned matter comes before the court on defendant's motion to dismiss. The plaintiffs appear by counsel, Rex A. Sharp of the firm of Neubauer, Sharp, McQueen, Dreiling & Morain, P.A. Defendant, State of Kansas, appears by and through Deputy Attorney General John W. Campbell. Pursuant to K.S.A. 60-255 and Sup.Ct.R. 165, the statement of controlling facts and legal principles are as follows:

STATEMENT OF CONTROLLING FACTS

1. Plaintiffs are attorneys at law, as well as a professional association of attorneys, who provided legal services to indigent criminal defendants pursuant to Indigent Defense Services Act, K.S.A. 22-4501, et seq. (Weeks) as amended and the rules of regulations promulgated to the Act prior to July 1, 1988.

2. On December 15, 1987 the Kansas Supreme Court issued its opinion in the case of *State, ex rel., Stephan v. Smith,* 242 Kan. 336, 747 P.2d 816 (1987). In its opinion, the Court held that the then current indigent defense system was constitutionally defective. The Court ordered district courts to continue the appointment of counsel under the system until July 1, 1988.

3. On January 4, 1988 some of the plaintiffs filed a Class Action Complaint and Mandamus Proceeding against the defendant in the United States District Court. This action was subsequently dismissed without prejudice on the basis of 11th Amendment immunity. The dismissal was upheld by the Tenth Circuit Court of Appeals. *Sharp, et al. v. State, et al.,* No. 88-1001-K (D.Kan. March 16, 1988); *Sharp, et al. v. State,* No. 88-1553 (10th Cir. May 7, 1990).

4. On March 16, 1988 some of the plaintiffs filed a Class Action Petition against the defendant in the District Court of Seward County, Kansas. Summary judgment was entered on behalf of the defendant by the Honorable Kim D. Ramey, District Court Judge, on October 17, 1988. (*Sharp, et al. v. State,* Seward County Case No. 88-C-33.)

5. On December 8, 1989 the Kansas Supreme Court affirmed the district court's judgment. (*Sharp v. State*, 245 Kan. 749, 783 P.2d 343 (1989), *rehearing denied*, March 14, 1990.)

6. On January 18, 1990 plaintiffs filed a Class Action Petition against the defendant in the District Court of Seward County, Kansas.

CONTROLLING LEGAL PRINCIPLES

The court has considered defendant's motion and memorandum, as well as plaintiffs' response. Further, oral argument of counsel have been heard and an opportunity to submit additional case support has been given. The following are the court's findings regarding the legal principles upon which its decision is based.

I. THIS COURT LACKS THE SUBJECT MATTER JURISDICTION TO RETRY PLAINTIFFS' CAUSE OF ACTION.

In the original state action (88 C 33) some of the plaintiffs sought to recover money damages for services rendered to indigent criminal defendants under a variety of legal theories. At the district court level, plaintiffs raised their unjust compensation theory (Count II). The Supreme Court found that the inverse condemnation theory (Count I) had not been raised at the district court, but even if it had been raised, it would not have stated a valid cause of action.

This court lacks subject matter jurisdiction to retry plaintiffs' cause of action. Plaintiffs' attempt to secure a

second action is barred by the doctrine of res judicata. The Kansas Supreme Court held in the case of *In Re Estate of Reed*, 236 Kan. 514, 519, 693 P.2d 1156 (1985):

> The doctrine of res judicata is a bar to a second action upon the same claim, demand or cause of action. It is founded upon the principle that the party, or some other with whom he is in privity, has litigated or had an opportunity to litigate, the same matter in a former action in a court of competent jurisdiction. *Penachio v. Walker*, 207 Kan. 54, 56, 483 P.2d 1119 (1971). The salutary rule of res judicata forbids a suitor from twice litigating a claim for relief against the same party. The rule is binding, not only as to every question actually presented, considered and decided, but also to every question which might have been presented and decided. *Hutchinson Nat'l Bank & Trust Co. v. English*, 209 Kan. 127, 130, 495 P.2d 1011 (1972). The doctrine of res judicata prevents the splitting of a single cause of action or claim into two or more suits; it requires that all the grounds or theories upon which a cause of action or claim is founded be asserted in one action or they will be barred in any subsequent action. *Parsons Mobile Products, Inc. v. Remmert*, 216 Kan. 138, 140, 531 P.2d (1975). This rule is one of public policy. It is to the interest of the state that there be an end to litigation and an end to the hardship on a party being vexed more than once for the same cause. The doctrine of res judicata is, therefore, to be given a liberal application but not applied so rigidly as to defeat the ends of justice. *Wells, Administrator v. Ross*, 204 Kan. 676, 678, 465 P.2d 966 (1970).

> An issue is res judicata when there is a concurrence of four conditions: (1) identity in the things sued for, (2) identity of the cause of action, (3) identity of persons and parties to the action, and (4) identity in the quality of the persons for or against whom the claim is made. *Kumberg v. Kumberg*, 232 Kan. 692, Syl. ¶ 6, 659 P.2d 823 (1983); *Adamson v. Hill*, 202 Kan. 482, 487, 449 P.2d 536 (1969).

This case fits perfectly into the res judicata doctrine. The claim or cause of action is identical: plaintiffs still seek additional reimbursement for legal services performed for indigent criminal defendants. The parties are the same or in privity: Rex Sharp, his law firm, and various members thereof versus the State of Kansas. The facts are the same: no fact complained of in the petition occurred prior to the entry of judgment in plaintiffs' first case (88-C-3). The issues are the same: are plaintiffs entitled to additional reimbursement for services provided to indigent criminal defendants prior to July 1, 1988?

Plaintiffs may contend they should be able to maintain Count I (inverse condemnation) of the petition because the Supreme Court found that they failed to raise the issue in the district court. *Sharp, supra* at 753-754. In addition, they may contend that they should be able to maintain Count II (Unjust Enrichment) of the petition because the Supreme Court affirmed the district court's dismissal of the first unjust enrichment claim due to plaintiffs' failure to satisfy the condition precedent required to prosecute such an action against the State. *Sharp, supra* at 754.

Under *Hutchinson National Bank, supra* at 130, these are not grounds sufficient to disregard a prior court's determination. *Opportunity* to litigate is the key to res judicata not actual litigating. Plaintiffs could have asserted their inverse condemnation claim in the first district court action. Plaintiffs could have followed the provisions of K.S.A. 46-907, as interpreted in 1981 in the case of *Wheat v. Finney,* 230 Kan. 217, 220-222, 630 P.2d 1160 (1981), and met the precedent necessary for filing an unjust enrichment claim against the state.

The fact that plaintiffs did not present their full case before the district court is not grounds for a second attempt.

Thus, this action is barred by the doctrine of res judicata and should be dismissed.

II. PLAINTIFFS FAIL TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

In Count I of plaintiffs' newest petition, they assert the theory of inverse condemnation. This theory was considered by Chief Justice Miller when, writing for a unanimous Supreme Court (Justice Six not participating), he found:

> Even were we to consider this theory, we find no case in which we have applied inverse condemnation to the taking of services. Condemnation and inverse condemnation ordinarily involve a taking of real property without the owner's consent. *Lone Star Industries, Inc. v. Secretary, Kansas Department of Transp.,* 234 Kan. 121, 124, 671 P.2d 511 (1983). It appears to be an

> inappropriate vehicle, in light of all of the usual and existing theories upon which recovery may be based, and we decline to extend it to the claims asserted here. *Sharp, supra* at 753-754.

This rejection is much more than dicta, it is "the law of the case."

The theory of inverse condemnation was examined and rejected by the Supreme Court. Even if plaintiffs could bring a second action, this theory would be barred. The theory of inverse condemnation having been rejected can not now be re-examined [sic]. *Barlett v. Davis Corporation,* 219 Kan. 148, 547 P.2d 800 (1976); *Headley v. Challiss,* 15 Kan. 602, 606 (1875).

In Count II of plaintiffs' petition, they assert the theory of unjust enrichment. Even if the court did not strike this count under the doctrine of res judicata, the theory would not state a claim upon which relief could be granted.

The services rendered by plaintiffs were done so according to statute (K.S.A. 22-4519, et seq.), rules and regulations (K.A.R. 105-11-1, et seq.), and court orders. All of the terms of plaintiffs' contract for services were expressed. The duties of the attorneys were dictated by the canon of ethics. The wages plaintiffs were to be paid were set out by rule and regulation.

The basis of unjust enrichment lies in a promise implied in law. *Peterson v. Midland Nat'l Bank,* 242 Kan. 266, 275, 747 P.2d 159 (1987). The statutes and regulations which directed plaintiffs never promised more compensation than plaintiffs received. Without this promise, implied in law, as it existed prior to July 1, 1988, plaintiffs

can not maintain an action based on unjust enrichment. *J.W. Thompson Co. v. Welles Products Corp.*, 243 Kan. 503, 512, 758 P.2d 738 (1988).

The Kansas Supreme Court held in *Sharp, supra* at 754-755:

> We have found no case, and none has been cited, which mandates the award of monetary damages in such a case in addition to equitable relief. We conclude that the district court did not err when it granted summary judgment.

Plaintiffs' petition fails to state a claim upon which relief can be granted. It should be dismissed.

CONCLUSION

WHEREUPON, in consideration of the above, the court finds for the defendant and grants defendant's motion and summary judgment is given to the defendant State of Kansas in this matter.

IT IS SO ORDERED.

/s/ Keaton G. Duckworth
Keaton G. Duckworth
Judge of the District Court

APPROVED BY:

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Attorneys for Plaintiffs

STATE OF KANSAS)
COUNTY OF SEWARD) ss
I certify that this is a full, true and correct copy of the document on file in this office.

Date July 13 1992
FAYE SHOEMAKER, CLERK
SEWARD COUNTY DISTRICT COURT
By Rebecca L. Alquist

PREPARED BY:

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APPENDIX 2

No. 66,282

REX A. SHARP, KERRY MCQUEEN, JAMES H. MORAIN, and DANIEL H. DIEPENBROCK, as individuals; NEUBAUER, SHARP, MCQUEEN, DREILING & MORAIN, P.A., as a firm; and all OTHER LAWYERS AS A CLASS REQUIRED BY THE STATE OF KANSAS TO REPRESENT KANSAS INDIGENT CRIMINAL DEFENDANTS, *Appellants*, v. THE STATE OF KANSAS, *Appellee*.

SYLLABUS BY THE COURT

1. APPELLATE PROCEDURE – *Overruling Decision – Prospective or Retroactive Application.* General principles underlying the prospective-retroactive application of an appellate court's overruling decision are stated and applied.

2. SAME – *Overruling Decision – Prospective or Retroactive Application – Options of Appellate Court.* In determining whether an overruling decision should be applied prospectively or retroactively, an appellate court has at least four options: (1) purely prosective [sic] application where the law declared will not even apply to the parties to the overruling case; (2) limited retroactive effect where the law declared will govern the rights of the parties to the overruling case but in all other cases will be applied prospectively; (3) general retroactive effect governing the rights of the parties to the overruling case and to all pending and future cases unless further litigation is barred by statutes of limitation or jurisdictional rules of appellate procedure; and (4) retroactive effect governing the rights of the parties to the overruling case and to other cases pending when the overruling case was decided and all future cases, but limited so the new law will not govern the rights of parties to cases terminated by a

judgment or verdict before the overruling decision was announced.

3. SAME – *Overruling Decision – Prospective or Retroactive Application – Options of Appellate Court.* In determining whether an overruling decision shall be applied prospectively or retroactively, an appellate court is free to adopt any of the alternatives set forth in syllabus ¶ 2, any combination thereof, or any other rule to establish an effective date which is fair, just, and equitable.

4. SAME – *Overruling Decision – Prospective or Retroactive Application* – Considerations by Appellate Court in Making Determination. Some of the factors commonly relied upon by courts in determining the prospective-retroactive application of a decision include (1) justifiable reliance on the earlier law; (2) the nature and purpose of the overruling decision; (3) res judicata; (4) vested rights, if any, which may have accrued by reason of the earlier law; and (5) the effect retroactive application may have on the administration of justice in the courts.

5. ATTORNEY AND CLIENT – *Indigent Criminal Defendant – Appointed Counsel – Prospective Application of Prior Appellate Decision that Held Unconstitutional the System then in Effect for Appointment of Counsel.* In a class action suit for damages brought by lawyers for themselves and as representatives of all lawyers who were required to represent indigent criminal defendants in Kansas prior to July 1, 1988, pursuant to the Indigent Defense Services Act, K.S.A. 22-4501 *et seq.*, and regulations promulgated thereunder, it is *held* that the decision in *State ex rel. Stephan v. Smith,* 242 Kan. 336, 747 P.2d 816 (1987), was prospective and applies only to services rendered by attorneys appointed pursuant to the Act after July 1, 1988.

6. APPEAL AND ERROR – *Trial Court Judgment Upheld if Correct Even if Based on Wrong Reason.* The decision of a trial court, if correct, is to be upheld even though the court may have relied upon an erroneous ground or reason for its decision.

Appeal from Seward district court, KEATON G. DUCKWORTH, judge. Opinion filed February 28, 1992. Affirmed.

Rex A. Sharp, of Neubauer, Sharp, McQueen, Dreiling & Morain, P.A., of Liberal, argued the cause and was on the brief for appellants.

John W. Campbell, deputy attorney general, argued the cause, and *Robert T. Stephan,* attorney general, was with him on the brief for appellee.

The opinion of the court was delivered by

HOLMES, C.J.: Plaintiffs appeal, in what was filed as a class action, from an order of the district court granting summary judgment to the State and dismissing the case. We affirm.

Plaintiffs, lawyers practicing in Liberal, Kansas, brought this suit as a class action for themselves and as representatives of all lawyers who were required to represent indigent criminal defendants in this state prior to July 1, 1988, pursuant to the Indigent Defense Services Act, K.S.A. 22-4501 *et seq.*, and the rules and regulations promulgated thereunder.

On December 15, 1987, the Kansas Supreme Court decided *State ex rel. Stephan v. Smith,* 242 Kan. 336, 747 P. 2d 816 (1987). *Smith* held that the appointment of attorneys under the indigent defense appointment system as it was then being applied was unconstitutional and granted

prospective relief to take effect July 1, 1988. By that date, changes were made in statutory law and in the administrative regulations, and plaintiffs do not attack the system which has been in operation since July 1, 1988.

This is the third action filed by these plaintiffs against the State of Kansas since our decision in *Smith*. On January 4, 1988, suit was filed in the United States District Court for the District of Kansas seeking injunctive relief and monetary damages. That action was subsequently dismissed on 11th Amendment grounds and the dismissal was upheld on appeal. The federal court action has no bearing on the issues in this case and will not be considered further in this opinion.

On March 16, 1988, plaintiffs filed a class action petition against the State of Kansas in the district court of Seward County, Kansas, seeking to recover money damages for legal services rendered under the then-existing court appointment system. The district court granted the State's motion for summary judgment, and plaintiffs appealed. The Kansas Supreme Court affirmed the dismissal of numerous causes of action for damages arising out of the court appointment system held unconstitutional in *Smith*. *Sharp v. State*, 245 Kan. 749, 783 P.2d 343 (1989), *cert. denied* 112 L. Ed. 2d 45 (1990) (hereinafter referred to as *Sharp I*). Two of the issues raised in *Sharp I* were claims for monetary damages based upon the theories of unjust enrichment and inverse condemnation. This court found that plaintiffs had not exhausted their administrative remedies as to the claim for unjust enrichment and affirmed the trial court's dismissal of that alleged claim for damages. The court also found that the inverse condemnation theory had not been raised in the

trial court and therefore was not properly before the Supreme Court. However, the court went on to note that even if an inverse condemnation theory had been raised, that theory would not state a valid cause of action.

Plaintiffs brought this action for damages as a class action suit, naming the same plaintiffs as in *Sharp I*, plus an additional party, Daniel H. Diepenbrock. Having exhausted their administrative remedies, plaintiffs renewed their unjust enrichment cause of action and also asserted a cause of action based upon inverse condemnation.

In the trial court the State filed a motion to dismiss on the grounds that *Sharp I* was res judicata to the issues in this case and that plaintiffs' petition based upon claims of inverse condemnation and unjust enrichment failed to state a claim for which relief could be granted. Following briefs and a hearing on the State's motion, the court adopted both arguments of the State, granted summary judgment to the State, and dismissed plaintiffs' petition.

Plaintiffs have timely appealed, asserting (1) that the district court erred in finding *Sharp I* precluded this action under the theory of res judicata, (2) that the district court erred in holding that the inverse condemnation claim failed to state a claim upon which relief could be granted, and (3) that the court erred in holding that the unjust enrichment claim failed to state a claim upon which relief could be granted.

Before considering the issues raised by the plaintiffs, there is a threshold question raised by our decision in *Smith* which should be addressed and which we find dispositive of the issues herein. In *Smith* the attorney

general filed an original action in mandamus to compel Judges Smith and Fromme, of the Fourth Judicial District, to perform duties specified by the Indigent Defense Services Act, K.S.A. 22-4501 *et seq.*, and the rules and regulations promulgated by the State Board of Indigents' Defense Services as published at K.A.R. 105-1-1 *et seq.* The respondent judges had issued orders which allegedly violated the statutes and rules and regulations.

In *Smith*, former Chief Justice Miller, in a lengthy and scholarly opinion, exhaustively reviewed the history of appointed counsel in criminal cases and the constitutionality of the statutory system as it was being administered in Kansas at the time. In a unanimous opinion this court held that the statutory scheme for appointment and payment of counsel for indigent defendants as administered violated both the federal and Kansas Constitutions. In doing so, the court concluded:

"The present system as now operated, we have held, violates certain provisions of the United States and the Kansas Constitutions. Changes are required. These may come about by both legislative and administrative action. The adoption of different bases for computing appointed counsel's compensation, the budgeting and funding of the same, and the possible extension of public defender systems or the adoption of contracts to provide counsel for indigents in some areas, or an intermixture of those and possibly other solutions, takes time. *Meanwhile, the indigent criminal defendants must have counsel, and that is a burden which the bar must continue to shoulder, at least temporarily, under the present system.*

" . . . *Respondents are directed to comply with the present statutes and regulations until July 1, 1988, and to appoint counsel under the present system until that date,* taking care

to see that competent counsel are appointed and no unreasonable burden or hardship is placed upon any attorney or attorneys. As we indicated in our temporary order, entered on July 17, 1987, it is the time necessarily spent by an attorney on indigent appointments, and not the number of appointments, which is the important factor in determining reasonableness or unreasonableness, fairness or hardship.

"The requested order of mandamus is denied." 242 Kan. at 383-84.

Does *Smith,* implicitly if not specifically, preclude the present action because our decision that the previous statutory scheme was unconstitutional was not to become effective until July 1, 1988, some five and a half months after the rendering of the opinion? We think so.

Unfortunately, the issue which we now deem to be controlling was not raised in *Sharp I,* although it should have been, and as a result was not considered by this court in reaching its prior decision. The learned trial judge in *Sharp I,* in a short letter opinion, stated:

"The motion for summary judgment is granted.

"The plaintiffs brought this action for damages arising out of an alleged failure by the state to pay them for court appointed attorney services. The plaintiffs stress several theories which they believe entitle them to recover. The real issue here is whether or not the plaintiffs have stated a cause of action upon which relief may be granted. I think not.

"Damages alone do not create a cause of action. A party must present a recognizable cause of action to support their claim. The Kansas Supreme Court has ruled in the case of *State ex rel. Stephan v. Smith,* 242 Kan. 336, that the former method of compensation for appointed

counsel violated the equal protection clauses of the U.S. and Kansas Constitutions. The court required the state to comply with existing statutes and regulations until July 1, 1988, and then adopt ' . . . different bases for computing appointed counsel's compensation, the budgeting and funding of the same, and the possible extension of public defender systems or the adoption of contracts to provide counsel for indigents in some areas, or an intermixture of those and possibly other solutions . . . . ' The court recognized that such action ' . . . takes time,' and simply stated that indigent defendants must have counsel, 'and that is a burden which the bar must continue to shoulder, at least temporarily, under the present system.'

"It is clear to me that the Kansas Supreme Court decidedly settled the issue presented by the plaintiffs.

"Accordingly, I am directing summary judgment for the defense. Mr. Campbell is to prepare a Journal Entry for Mr. Sharp's review and approval."

It appears to us that although counsel for the parties in *Sharp I* made numerous constitutional and other arguments, the trial court cut through all of them and actually determined that our opinion in *Smith* controlled and was to be applied prospectively only, beginning July 1, 1988. We conclude the trial court's interpretation of our opinion in *Smith* was correct.

The determination of whether a judicial decision which overrules prior case law or holds statutory law to be unconstitutional should be applied prospectively or retroactively has been the subject of literally hundreds, if not thousands, of cases. It has also been the subject of numerous treatises, articles, and legal encyclopedias. We will not attempt to consider the subject at length, but some basic principles and rules are worthy of repeating.

The guiding principles underlying the prospective-retroactive application of an appellate court's decision are well settled. It has long been recognized that an appellate court has the power to give a decision prospective application without offending constitutional principles. *Carroll v. Kittle,* 203 Kan. 841, 851-52, 457 P.2d 21 (1969). See *Gt. Northern Ry. v. Sunburst Co.,* 287 U.S. 358, 77 L. Ed. 360, 53 S. Ct. 145 (1932); *Vaughn v. Murray,* 214 Kan. 457, 464, 521 P.2d 262 (1974). In *Vaughn,* we said, "As a matter of constitutional law, it can safely be said, retroactive operation of an overruling decision is neither required nor prohibited." 214 Kan. at 464.

In the landmark case of *Henry v. Bauder,* 213 Kan. 751, 518 P.2d 362 (1974), this court held the longstanding Kansas guest statute to be unconstitutional. In addition to striking down the statute, the opinion also overruled prior existing case law. 213 Kan. at 762. However, there was no determination of whether the decision was to be applied retroactively or prospectively. Shortly thereafter, in *Vaughn,* 214 Kan. 456, the court was called upon to determine the retroactive or prospective effect of its earlier holding in *Bauder.*

In considering whether an overruling decision should be applied prospectively or retroactively, this court in *Vaughn* identified four options:

"(1) Purely prospective application where the law declared will not even apply to the parties to the overruling case; (See cases collected 10 A.L.R.3d, § 7, p. 1393) (2) Limited retroactive effect where the law declared will govern the rights of the parties to the overruling case but in all other cases will be applied prospectively; (See *Carroll v. Kittle,* 203 Kan. 841, Syl. ¶ 10, 457 P.2d 21; and cases

collected in 10 A.L.R.3d, § 8[b], p. 1399.) (3) General retroactive effect governing the rights of the parties to the overruling case and to all pending and future cases unless further litigation is barred by statutes of limitation or jurisdictional rules of appellate procedure; (See cases collected in 10 A.L.R.3d, § 8[e], pp. 1407-1412.) and (4) Retroactive effect governing the rights of the parties to the overruling case and to other cases pending when the overruling case was decided and all future cases, but limited so the new law will not govern the rights of parties to cases terminated by a judgment or verdict before the overruling decision was announced. (See *Hanes v. State*, 196 Kan. 404, 411 P.2d 643, and cases collected in 10 A.L.R.3d, § 8 [c, d], pp. 1401-1407.)" 214 Kan. at 465-66.

This court has also noted that "it is clear that the court is free to adopt any of the alternatives set forth in *Vaughn v. Murray*, any combination thereof, or any other rule to establish an effective date of an overruling decision which is fair, just and equitable." *Thome v. City of Newton*, 229 Kan. 375, 379, 624 P.2d 454 (1981).

While it should be noted that the annotation found in 10 A.L.R.3d 1371 was directed to judicial decisions which overruled prior court decisions, the principles set forth therein have generally been applied to decisions holding statutes to be unconstitutional, as this court did in *Vaughn*.

In *Vaughn*, this court recognized five factors commonly relied upon by courts in determining the retroactivity question:

"Some of the factors which have been considered are: (1) Justifiable reliance on the earlier law; (2) The nature and purpose of the overruling decision; (3) *Res Judicata;* (4) Vested rights, if any, which may have accrued by reason

of the earlier law; and (5) The effect retroactive application may have on the administration of justice in the courts." 214 Kan. at 464.

Although we might have been more specific in our concluding language in *Smith*, we think it is clear that the intent of that decision was that it would only operate prospectively beginning July 1, 1988. In *Smith* we held:

"Respondents are directed to comply with the present statutes and regulations until July 1, 1988, and to appoint counsel under the present system until that date." 242 Kan. at 384.

Assuming, for the sake of argument, that our directions in *Smith* did not clearly and specifically state the decision was only to be applied prospectively, an evaluation of the five factors identified in *Vaughn* would certainly support, if not compel, such a conclusion.

The first factor is whether there was any justifiable reliance on the earlier law which worked to the detriment of the plaintiffs. Certainly the plaintiffs cannot demonstrate any detrimental reliance in performing services under the old system. The historical and time-honored duty of a lawyer to provide pro bono services to the indigent was explored in depth in *Smith* and need not be repeated here. On the other hand, the State of Kansas and the State Board of Indigents' Defense Services had, in good faith, relied upon the statutes and regulations since their inception and had of necessity used general fund tax dollars of the citizens of Kansas in doing so. Such reliance was fully justified not only by the duly enacted statutes but also by the historical precedent which existed prior to the statutes and as recognized in numerous cases,

dating back as far as *Case v. Shawnee Co.*, 4 Kan. 511 (1868).

The second factor recognized in *Vaughn* is the nature and purpose of the overruling decision. The announced purpose of the decision in *Smith* was to prevent *future* constitutionally inadequate compensation of attorneys. It was not to create any new rights to additional compensation for services already rendered and paid for under the existing law. This court recognized the seriousness of the situation when it directed the bar of Kansas to continue to furnish services under a system the court found to be constitutionally deficient. That holding does not comport with any intent to create additional retroactive rights and certainly it was never intended that the purpose of the decision was to reach back into the past and provide further compensation for services already rendered.

The third factor is res judicata, and it must be conceded that the principles of that doctrine are not applicable to the *Smith* decision as it relates to the present case.

The fourth factor is the extent to which vested rights, if any, may have accrued by reason of the earlier law. Prior to our decision in *Smith*, there were no vested rights for attorneys to receive compensation over and above the amounts paid pursuant to the then-existing law.

The final factor from *Vaughn* is the effect that retroactive application might bear on the administration of justice in the courts. While the actual impact would be impossible to predict with any great degree of certainty, it is obvious that extensive litigation and judicial time would be required to determine on a case-by-case basis

the extent to which each attorney might have been undercompensated. Even in a class action suit, each claim would have to be given individual attention, and consideration of the numerous variables applicable to each case would result in an intolerable burden upon an already underfunded and understaffed judicial system.

We conclude and, therefore, hold that our decision in *Smith* which found the indigent defense services system then in effect to be unconstitutional as then applied had prospective application only as to services rendered after July 1, 1988. The system as administered prior to that date controlled payment for services rendered prior to July 1, 1988, and plaintiffs have no claim or cause of action for any additional compensation for services rendered prior to such date.

While it is true that the trial court in this case did not base its decision on the issue here determined, it has long been the rule that a trial court decision which reaches the right result will be upheld on appeal even though it is based upon an erroneous reason. *Collins v. Heavener Properties, Inc.*, 245 Kan. 623, Syl. ¶ 2, 783 P.2d 883 (1989); *Prairie State Bank v. Hoefgen*, 245 Kan. 236, Syl. ¶ 3, 777 P.2d 811 (1989).

In view of the decision reached herein, it is not necessary to consider further the arguments of the plaintiffs.

The judgment is affirmed.

APPENDIX 3

SUPREME COURT ORDER

DISTRICT CASE NO. 90C14

IN THE SUPREME COURT

OF THE STATE OF KANSAS

REX A SHARP
NEUBAUER SHARP MCQUEEN
DREILING & MORAIN P A
P O BOX 2619
LIBERAL KS 67905-2619

REX A. SHARP, ET AL., APPELLANTS,
V.
STATE OF KANSAS, APPELLEE.

NO. 91-66282-AS

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR REHEARING BY APPELLANT, REX SHARP, ET AL.
DENIED.

DATE: 04/21/92

CAROL G. GREEN
CLERK

Supreme Court, U.S.
FILED
AUG 20 1992
OFFICE OF THE CLERK

No. 92-142

In The

Supreme Court of the United States

October Term, 1992

REX A. SHARP, KERRY MCQUEEN, JAMES H. MORAIN, and DANIEL H. DIEPENBROCK, as individuals, NEUBAUER, SHARP, MCQUEEN, DREILING & MORAIN, P.A., as a firm, and ALL OTHER LAWYERS AS A CLASS REQUIRED BY THE STATE OF KANSAS TO REPRESENT KANSAS INDIGENT CRIMINAL DEFENDANTS

Petitioners,

v.

THE STATE OF KANSAS,

Respondent.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

ROBERT T. STEPHAN,
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Counsel of Record
for Respondent

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QUESTION PRESENTED FOR REVIEW

I. DID THE KANSAS SUPREME COURT ERR IN AFFIRMING THE SEWARD COUNTY DISTRICT COURT ON THE GROUNDS THAT ITS DECISION IN *STATE ex. rel. STEPHAN v. SMITH,* 242 Kan. 336, 747 P.2d 816 (1987) WAS PROSPECTIVE AND APPLIES ONLY TO SERVICES RENDERED BY ATTORNEYS APPOINTED PURSUANT TO THE KANSAS INDIGENT DEFENSE SERVICES ACT, K.S.A. 22-4501, *et seq.* AFTER JULY 1, 1988?

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No. 92-142

In The

Supreme Court of the United States

October Term, 1992

REX A. SHARP, KERRY McQUEEN, JAMES H. DIEPENBROCK, and JAMES H. MORAIN, as individuals, NEUBAUER, SHARP, McQUEEN, DREILING & MORAIN, P.A., as a firm, and ALL OTHER LAWYERS AS A CLASS REQUIRED BY THE STATE OF KANSAS TO REPRESENT KANSAS INDIGENT CRIMINAL DEFENDANTS,

Petitioners,

v.

THE STATE OF KANSAS,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

STATEMENT OF THE CASE

This appeal is from the third of petitioners' suits against the State of Kansas. The latest petition for a writ of certiorari is the third filed in these cases.

Through these actions, petitioners have sought monetary damages for injuries allegedly sustained as result of the Indigent Defense Services Act, K.S.A. 22-4501 *et seq.* (Weeks) as amended, its statutory precedent, and the rules and regulations promulgated pursuant to the Act. Petitioners are attorneys at law, as well as a professional association of attorneys who were appointed by state district courts to represent indigent criminal defendants. They were compensated pursuant to the Act.

The origins of this case are found in the December 15, 1987 opinion of the Kansas Supreme Court in the case of *State ex rel. Stephan v. Smith,* 242 Kan. 336, 747 P.2d 816 (1987). In that case, Chief Justice Miller, writing for a unanimous Kansas court, reversed century old precedent and found that attorneys appointed to defend indigent criminal defendants do have a right to compensation. It was truly a landmark decision for the state. It recognized attorney services as property protected by the Constitution for the first time in Kansas. Petitioners had absolutely nothing to do with this change in the law.

The Kansas Legislature meets from January to April each year. The state's fiscal year begins on July 1, and ends on June 30 of each year. The *Smith* decision did allow the state legislature the time needed to double the indigent defense system's budget, create a voluntary system of court appointments, and expand the public defender system.

On January 4, 1988, three weeks after the *Smith* decision, petitioners' filed a Class Action Complaint and Mandamus Proceeding against the State of Kansas in the United States District Court for the District of Kansas. This action was subsequently dismissed without prejudice on the basis of 11th Amendment Immunity. The dismissal was upheld by the Tenth Circuit Court of Appeals. Certiorari was denied by this Court. *Sharp, et al. v. State of Kansas,* No. 88-1001-K (D.Kan. March 16, 1988), *aff'd.* No. 88-1553, (10th Cir. May 7, 1990), *cert. denied,* 112 L.Ed.2d 206 (1990), hereinafter referred to as *Sharp-Fed.*

On March 16, 1988, petitioners filed a second Class Action Petition against the State of Kansas in the State District Court of Seward County, Kansas. Summary judgment was entered in favor of Kansas. The primary basis of the state's argument was that the petitioners were suing the wrong defendant under numerous theories of law

which either did not exist, or did not apply to the State of Kansas.

On December 8, 1989, the Kansas Supreme Court affirmed the district court's judgment. Chief Justice Miller, again writing for a unanimous court, found that petitioners had not stated a cause of action in the district court. This Court again refused to hear the petitioner's appeal. *Sharp v. State,* 245 Kan. 749, 783 P.2d 343, *cert. denied,* 112 L.Ed.2d 45 (1990), hereinafter referred to as *Sharp I.*

On January 18, 1990, petitioners filed a third Class Action Petition against the State of Kansas, in the District Court of Seward County, Kansas. Petitioners, in this action, sought monetary damages under a Fifth Amendment inverse condemnation theory, as well as a state claim of unjust enrichment. The State's motion to dismiss was granted on the grounds of res judicata and failure of the petition to state a claim upon which relief could be granted.

On February 28, 1992, the Kansas Supreme Court affirmed the district court's judgment. Chief Justice Holmes writing for a unanimous court found that the case of *Smith, supra,* which is the foundation of petitioners' case, was intended to be applied prospectively and did not support petitioners' claims. *Sharp v. State,* 250 Kan. 408, 827 P.2d 12, *reh. denied,* ____ Kan. ____ (1992), hereinafter referred to as *Sharp II.*

On July 20, 1992, petitioners filed their third petition for writ of certiorari. Respondent received its copy on July 22, 1992.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE DECISION OF THE KANSAS SUPREME COURT DID NOT CONFLICT WITH ANY OTHER STATE COURT OF LAST RESORT, ANY UNITED STATES COURT OF APPEALS OR THE UNITED STATES SUPREME COURT.

A. THE KANSAS SUPREME COURT DID NOT ERR IN AFFIRMING THE SEWARD COUNTY DISTRICT COURT ON THE GROUNDS THAT THE DECISION IN *STATE, ex rel. STEPHAN v. SMITH,* 242 Kan. 336, 747 P.2d 816 (1987), WAS PROSPECTIVE AND APPLIES ONLY TO SERVICES RENDERED BY ATTORNEYS APPOINTED PURSUANT TO THE INDIGENT DEFENSE SERVICES ACT, K.S.A. 22-4501, *et seq.* AFTER JULY 1, 1988.

The citizens of the State of Kansas have always enjoyed the right to be represented by legal counsel in criminal proceedings. U.S. Const. Amend. VI; Kan. Const. Bill of Rights, § 10, *State v. Verry,* 36 Kan. 416, 420, 13 P. 838 (1887). The right of counsel under the federal Constitution has evolved into a requirement that indigent defendants must be provided legal counsel at state expense. *Argersigner v. Hamlin,* 407 U.S. 25, 32 L.Ed.2d 530, 92 S.Ct. 2006 (1972); *Gideon v. Winwright,* 372 U.S. 335, 9 L.Ed.2d 799, 83 S.Ct. 792 (1963); *Powell v. Alabama,* 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55 (1932). The United States Supreme Court, while mandating legal assistance for indigent defendants, has never told the states how such services must be provided, leaving such matters to the states. Drecksel, *The Crisis in Indigent Criminal Defense,* 44 Ark.L.Rev. 363, 369-70.

From the early days of statehood until July 1, 1988, attorneys in Kansas were under a legal obligation to pro-

vide counsel to indigent criminal defendants when so ordered by the court. *State, ex rel. Stephan v. Smith,* 242 Kan. 336, 360-61, 747 P.2d 816 (1987); *Case v. Board of County Commissioners,* 4 Kan. 511, 513-14 (1868). During that time period, the Kansas courts followed the then majority rule and held that the attorney so ordered to represent an indigent did not have a constitutional right to compensation. *Smith,* 242 Kan. at 368-69; *Clark v. Ivy,* 240 Kan. 195, 202, 727 P.2d 493 (1986); *State v. Keener,* 224 Kan. 100, 102, 577 P.2d 1182 (1978); *United States v. Dillion,* 346 F.2d 633, 635 (9th Cir. 1965). With the *Smith* decision, the Kansas Supreme Court found that the traditional duty of the attorney to defend the indigent could no longer be enforced by traditional methods. The court ordered changes were to be made to the system by the deadline selected by the court. *Sharp v. State,* 245 Kan. 749, 754-55, 783 P.2d 343 (1989).

This litigation is petitioners' third attempt at money damages for injuries which allegedly resulted from their pre-*Smith* indigent defendant appointments. This latest petition is a challenge to the Kansas Supreme Court's use of Kansas law in holding that the *Smith* decision is to be applied prospectively. It is not the Kansas Supreme Court which is in err, it is the petitioners.

The United States Supreme Court has never held that the United States Constitution requires that attorneys who represent state indigent criminal defendants be fully compensated for their services. The foundation of petitioners' argument is the case of *James B. Beam Distilling Co. v. Georgia,* ____ U.S. ____, 111 S.Ct. 2439, 115 L.Ed.2d 481 (1991). That narrow opinion (see 111 S.Ct. at 2448) deals only with application of precedent of the *United States Supreme Court* All of the cases relied upon by petitioners are based upon the application of United States Supreme Court precedent.

The fact that that Kansas Supreme Court relied, in part, on the United States Constitution in *Smith,* does not

magically transform their decision into federal precedent which can be applied only retrospectively. As Justice Cardozo held,

> the federal constitution has no voice upon the subject. A state in defining the limits of adherence to precedent may make a choice for itself between the principle of forward operation and that of relation backward. It may say the decisions of its highest court, though later overruled, are law none the less for intermediate transactions. *Great Northern Railway v. Sunburst Co.*, 287 U.S. 358, 364, 53 S.Ct. 145, 148, 77 L.Ed. 360 (1932).

A most recent example of this philosophy is found in the case of *Robinson v. Ponte*, 933 F.2d 101 (1st Cir. 1991). In this case, the circuit court refused to compel the retrospective application of a Massachusetts Supreme Court decision in a criminal case, even though said decision was based on the state court's interpretation of the United States Constitution.

As stated by the *Robinson* court:

> Therefore, that federal constitutional principles underlay the new rule of state law announced by *Henson*, does not convert the SJC's decision not to apply that rule retroactively on collateral review into a matter of federal due process concern. *See also Hicks v. Callahan*, 859 F.2d 1054, 1057-58 (1st Cir. 1988) (where state court declines to apply retroactively, on collateral review, its new rule that, where an underlying felony is unarmed robbery, the felony murder rule applies only if the jury finds that the defendant consciously disregarded risk to human life, there is no valid federal constitutional reason to do so), *cert. denied*, 489 U.S. 1069, 109 S.Ct. 1349, 103 L.Ed.2d 817 (1989); *La Rue v. McCarthy*, 833 F.2d 140, 143 (9th Cir. 1987) (there is no federal due process violation when a state court declines to apply retroactively on collateral review a decision holding that a person cannot be convicted of felony murder when the underlying offense is child abuse), *cert. denied*, 485 U.S. 1012, 108 S.Ct. 1482, 99 L.Ed.2d 710 (1988); *Bowen v. Foltz*, 763 F.2d 191, 193-94 (6th Cir. 1985) (state court's decision to decline to apply retroactively on collateral relief new rule requiring that the issue of malice, henceforth, must always be sub-

> mitted to the jury does not raise a federal question) *Robinson,* 933 F.2d at 104.

In criminal law, the decisions of the United States Supreme Court are completely retroactive. *Griffin v. Kentucky,* 479 U.S. 314, 328, 107 S.Ct. 708, 93 L.Ed.2d 649 (1987). Even under *Beam* some United States Supreme Court civil law decisions may be applied prospective. 111 S.Ct. at 2446. In light of *Great Northern Railway, supra,* as applied in criminal cases, there is little doubt that the United States Supreme Court should continue to abide by the principle of federalism which allow state courts to apply their own procedures and precedent in the manner that such state court believes is appropriate even when considering questions of federal law, e.g. *Asarco, Inc. v. Kadish,* 490 U.S. 605, 617, 109 S.Ct. 2037, 104 L.Ed.2d 696 (1989).

In addition to and in support of the above, defendant also suggests that petitioners' arguments ignore the special relationship between the Kansas Supreme Court and the attorneys which it licenses. The United States Supreme Court has often deferred to their state counterparts on the regulation and discipline of attorneys. An example of such difference is the Court's refusal to grant certiorari in the case of *Sharp v. State,* 245 Kan. 749, 783 P.2d 343 (1989) *cert. denied,* 112 L.Ed.2d 45 (1990). (*Sharp I.*)

This respect for the state judiciary in matters regarding the bar is summarized in *Hoover v. Ronwin,* 466 U.S. 558, 569 n. 18, 80 L.Ed.2d 590, 104 S.Ct. 1989 (1984), in which the Court held:

> Rowin does not dispute that regulation of the bar is a sovereign function of the Arizona Supreme Court. In *Bates State Bar of Arizona,* 433 U.S. 350, 361, 53 L.Ed.2d 810, 97 S.Ct. 2691 (1977), the Court noted that "the bar is at the core of the State's power to protect the public." Likewise, in *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 792, 44 L.Ed.2d 572, 95 S.Ct. 2004 (1975) the Court stated: "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function

> of administering justice, and have historically been 'officers of the courts.' " See also *In re Griffiths*, 413 U.S. 717, 722-723, 37 L.Ed.2d 910, 93 S.Ct. 2851 (1973). Few other professions are as close to "the core of the State's power to protect the public." Nor is any trade or other profession as "essential to the primary governmental function of administering justice."

There is no precedent compelling the Court to require monetary damages be made available to the petitioners. Petitioners' reliance on liquor taxes precedent notwithstanding Justice Miller's opinion in *Sharp I* was correct. See *Sharp I*, 245 Kan. 755. The Kansas Supreme Court's regulation of attorney conduct is recognized in law. The Kansas Supreme Court's reliance on the *Smith* and *Sharp I* cases is well placed.

The *Smith* decision did break new legal ground. The specific overruling of the century old precedent contained in *Case, supra.* Given the facts that courts still rely on the *Dillion, supra* precedent which held that no compensation is constitutionally due, arguments that the state should have known that the old system was unconstitutional are without merit. See *Walters v. Kemp*, 845 F.2d 260, 263 (11th Cir. 1988); *State, ex rel. Dressier v. Circuit Court*, 472 N.W.2d 532, 538-39 (Wis.App. 1991).

The *Smith* decision did bring about rapid and beneficial change. As stated in oral arguments in *Sharp I*, the budget for indigent defense services nearly doubled as a direct result of the *Smith* decision. By the date specified in the *Smith* decision, an original action brought by the state in response to Judge Smith's order in which the named petitioners had no part, a new system of indigent defense services was enacted and funded by the legislature. The purposes of justice was served. *Sharp I*, 245 Kan. 754-55.

CONCLUSION

The Kansas Supreme Court did not err in its opinion of February 28, 1992. Its reliance on Kansas law is not in conflict with any decision of the United States Supreme Court. This case should be concluded. The petition should be denied.

Respectfully submitted,

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